(9)

No. 87-2048

In the Supreme Court of the United States

OCTOBER TERM, 1988

TEXACO INC., PETITIONER

v.

RICKY HASBROUCK, DBA RICK'S TEXACO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a supplier that offers uniform prices to purchasers at the same level of the distribution chain may be liable under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a), if the supplier is aware that an independent wholesaler passes on to retailers a portion of the discount that it receives from the supplier, thereby undercutting the price that the supplier offers directly to retailers and placing the supplier's retailer customers at a competitive disadvantage.

2. Whether the court of appeals erred in concluding that the plaintiffs demonstrated "injury to competition" within the meaning of the Robinson-Patman Act.

3. Whether the jury's damage award in this case conflicts with this Court's holding in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981), that plaintiffs in a Robinson-Patman Act case are not entitled to minimum or "automatic" damages in the amount of any unlawful price discrimination.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Texaco Inc. sold gasoline and other petroleum products in the Spokane, Washington, area until 1981. Respondents are 12 individuals (or their successors in interest) who, at various times during the period relevant to this litigation, operated automotive filling stations in Spokane that sold gasoline at retail under the Texaco brand name.

Texaco sold gasoline directly to respondents at a delivered "retail tank wagon" (RTW) price. It sold the same gasoline to at least two other firms in Spokane—the Dompier Oil Company and the Gull Oil Company—at a lower price, under distributor contracts providing for a fixed discount relative to the RTW price. Gull, as an "unbranded distributor" selling gasoline under its own trade name, received a greater discount than Dompier, which sold the gasoline under the Texaco brand name. Both

companies sold at least some gasoline to stations that they neither owned nor controlled.

2. a. In January 1976, respondents filed suit in the United States District Court for the Eastern District of Washington. The complaint, as amended, alleged that Dompier and Gull competed with respondents "in the sale of gasoline motor fuels," and that petitioner's sale of gasoline to Dompier and Gull at lower prices than those charged respondents for gasoline of "like kind and quality" tended to lessen substantially the competition between respondents and Dompier, Gull, and the stations that Dompier and Gull supplied, in violation of Section 2(a) of the Robinson-Patman Anti-Discrimination Act (Robinson-Patman Act), 15 U.S.C. 13(a). C.A. E.R. 13-14.

The case was tried over a four-week period in late 1979. The jury rendered a verdict in favor of each respondent on the Robinson-Patman Act claim and awarded damages totaling $849,484 before trebling. Petitioner moved for judgment notwithstanding the verdict challenging, among other things, the court's instructions on damages. The district court granted the motion because it concluded that the damage theory under which the case had been submitted to the jury was no longer valid. While respondents' appeal from that judgment was pending, this Court addressed the damages issue in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981). This Court rejected the notion that plaintiffs in a Robinson-Patman Act case are entitled to "automatic damages" equal to the amount of an illegal price discrimination. The court of appeals then held that respondents were entitled to attempt to prove damages under a theory consistent with *J. Truett Payne*, and it remanded the case for a new trial on both liability and damages. *Hasbrouck* v. *Texaco, Inc.*, 663 F.2d 930 (9th Cir. 1981), cert. denied, 459 U.S. 828 (1982).

b. The case was tried again in June 1985. The parties stipulated that petitioner charged Dompier and Gull prices that were lower by specified amounts than the RTW prices that petitioner charged respondents. See C.A. E. R. 33-34. There was extensive testimonial and documentary evidence tending to establish that

the stations owned or supplied by Dompier often posted *retail* prices that were barely, if at all, higher than the *wholesale* (RTW) price that petitioner charged respondents for their gasoline.[1] In addition, a number of respondents testified about complaints they received from customers concerning the difference between their retail prices and the prices charged by the stations owned or supplied by Dompier.[2]

Respondents also introduced evidence establishing that they had complained repeatedly to petitioner about its pricing policies, and that petitioner was aware that the discount offered to Dompier and Gull conferred a competitive advantage on stations owned or supplied by those companies. Respondents argued that the wholesale services allegedly performed by Dompier were nonexistent or de minimis and were, in any event, fully covered by a "hauling allowance" that petitioner granted Dompier in addition to its discount. Finally, there was evidence that Dompier's purchases of gasoline from petitioner increased substantially during the period in question while respondents' purchases decreased. Respondents presented several different damage estimates based on differing assumptions as to how petitioner might have eliminated the challenged price difference.

Petitioner argued that the lower prices to Dompier and Gull were "functional discounts" reflecting various wholesale services Dompier and Gull performed. Petitioner also urged that respondents had failed to demonstrate that the challenged price differences caused any harm to competition because (1) petitioner did not control the price at which Dompier or Gull resold gasoline at either the wholesale level or the retail level; (2) re-

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[1] See, *e.g.*, Tr. 243, 315, 400, 493, 600, 640. Respondents introduced evidence pertaining to both Dompier and Gull, but the majority of their case focused on the effect of the challenged discount on their ability to compete with stations that dealt with Dompier.

[2] See, *e.g.*, Tr. 238, 243, 249, 401, 600-601. Several former customers of particular respondents testified that they started purchasing some or all of their gas from the Dompier stations instead of respondents because of these retail price differences. See, *e.g.*, Tr. 480, 639-640, 1537-1539, 1586-1589, 1596-1597.

spondents were not in substantial competition with Dompier, Gull, or any of the stations they owned, operated, or supplied; and (3) factors other than the discounts to Dompier and Gull were responsible for respondents' lost sales.[3]

The jury found for each respondent and awarded damages totaling $449,900 before trebling.

c. The district court denied petitioner's motions for a new trial and for judgment notwithstanding the verdict. Pet. App. B1-B17. In rejecting petitioner's motion for judgment notwithstanding the verdict, the court acknowledged that functional discounts generally do not trigger Robinson-Patman Act liability. *Id.* at B3. In its view, however, the evidence demonstrated that petitioner's discounts provided to Dompier and Gull adversely affected competition because the discount was not offset by Dompier's and Gull's costs and was passed along to retail competitors of respondents. *Id.* at B4-B6. The district court also held that the evidence demonstrated competitive injury and antitrust injury, as required by *J. Truett Payne*. The court noted that respondents not only had established the existence of substantial price discrimination over time, but also had proved that sales were diverted. *Id.* at B6-B9. In rejecting petitioner's motion for a new trial, the district court explained that, contrary to petitioner's contention, respondents had not based their proof of damages on the assumption that elimination of the price differential would require lowering the price they paid. Rather, respondents had presented evidence concerning several different ways in which the differential could be eliminated. *Id.* at B10-B15.

3. The court of appeals affirmed. Pet. App. A1-A20. It rejected petitioner's arguments that the Robinson-Patman Act requires only that all customers in a given functional class be treated equally and that any harm respondents suffered because Dompier "passed through" its discount to the stations that it supplied in its wholesale capacity could not support a finding of Robinson-Patman Act liability. *Id.* at A7-A10. The court of appeals agreed that the Robinson-Patman Act allows "[m]anufacturers * * * to use price differentials, commonly known as wholesale or functional discounts" and that "goods may generally be sold to wholesalers at a lower price than that charged to retailers." *Id.* at A7. Nonetheless, the court concluded, citing this Court's decisions in *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), *Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969), and *Falls City Industries* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983), that "there may be a Robinson-Patman violation even if the favored and disfavored buyers do not compete, so long as the customers of the favored buyer compete with the disfavored buyer or its customers." Pet. App. A8. Thus, the court stated, there could be a violation if the discount was not cost based and if the discount was "passed on" to stations that Dompier and Gull supplied. The court found "ample evidence" in the record to show such a violation (*ibid.*).[4]

The court of appeals also rejected petitioner's contention that respondents had failed to demonstrate the requisite injury to competition. Pet. App. A10-A12. In the court's view, the evidence established that the challenged discrimination was "substantial and * * * in effect for several years," and was thus sufficient to permit the jury to conclude that "competition may have been harmed." *Id.* at A12. Moreover, the court noted, respond-

[3] Petitioner also sought to establish that its discounts were lawful under the "cost justification" and "meeting competition" provisos of Section 2(a) and (b), 15 U.S.C. 13(a) and (b). The district court, however, excluded the evidence on which petitioner primarily based its cost justification defense (Tr. 2871) and refused to submit the issue to the jury. The jury was instructed on petitioner's meeting competition defense.

[4] The court noted that respondents had introduced evidence that the wholesale "services performed by Gull and Dompier were insubstantial." Pet. App. A8. The court also agreed with the district court that petitioner "made 'no serious attempt' to provide a quantitative justification" for the discounts. *Ibid.* The court also pointed to evidence that "some retail stations operated or supplied by Dompier and Gull purchased gasoline at prices lower than those paid by" respondents, as well as evidence that "service stations operated or supplied by Dompier often sold gasoline at retail prices that were only two to three cents higher than the price" respondents paid petitioner, concluding that respondents had established that "some portion of the discount was passed along." *Id.* at A9.

ents also presented "direct evidence of displaced sales," which was "probative of the fact that the unwarranted price advantages which some Gull- and Dompier-supplied retailers received had a deleterious effect upon the market." *Id.* at A11-A12.[5]

Finally, the court rejected petitioner's argument, based on *J. Truett Payne,* that the jury should have been instructed that the essence of a Robinson-Patman Act violation is not that the disfavored purchaser has been "overcharged," but instead that the favored purchaser has been "undercharged." The court held that the district court's instructions on damages were sufficient to ensure that the jury did not proceed on a forbidden "overcharge" theory and that the court was not required to "use the exact words requested" by petitioner. Pet. App. A19. As the court of appeals saw it, the jury was entitled to "determine what [respondents'] sales and profits would have been in the absence of price discrimination," and "such a determination necessarily entails postulating the elimination of the price differential, either by increasing the favored buyer's price, decreasing the disfavored buyer's price, or a combination of the two." *Id.* at A16.

DISCUSSION

We are troubled by the court of appeals' discussion of a supplier's liability under the Robinson-Patman Act when an independent wholesaler undercuts the supplier's price to retailers and a jury concludes that the wholesaler's discount was not "cost based." We are mindful, however, that "[t]his Court * * * reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories,* 351 U.S. 292, 297 (1956). On that basis, we do not believe that this case merits review. We do not believe that the case necessarily stands for the proposition that a supplier must undertake affirmatively to monitor the costs and pricing policies

[5] Specifically, the court noted that there was testimony that respondents "lost customers and sales directly to Dompier and Gull stations, that the customer switches resulted from the difference in retail prices between the stations, and that [respondents] would have recovered these lost revenues had they received as little as a two or three cents per gallon discount and been able to reduce their pump prices commensurately." Pet. App. A12.

of wholesalers to which it offers a functional discount, as petitioner contends. Rather, the jury was required to find that petitioner had actual knowledge that the discount it offered was resulting in competitive injury to its retailer customers. Moreover, we are not convinced that the theory articulated by the court of appeals would often provide a basis for damage recoveries, because suppliers will seldom find it profitable to offer a discount that results in competitive injury to their own retailer customers. In any event, it is not clear that the issue petitioner raises plays more than a minor role even in this case because the jury could have viewed the favored purchasers – Dompier and Gull – as retailers in competition with respondents rather than as independent wholesalers.[6]

[6] We confine our discussion in text to petitioner's first and broadest contention, that the differing prices charged to respondents and to Dompier and Gull should not have been subjected to Robinson-Patman Act scrutiny at all because Dompier and Gull were wholesalers and respondents were retailers. The other two issues that petitioner raises do not warrant this Court's review in our opinion. Petitioner contends that the court of appeals allowed the jury to infer the requisite injury to competition from the fact that petitioner charged "wholesalers [a] lower [price] than * * * retailers" (Pet. 13) and, in so doing, adopted a per se rule of illegality. In *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), this Court held that a persistent and substantial price discrimination could give rise to an inference of injury sufficient to support a prima facie case under the Robinson-Patman Act. The district court's instruction to the jury was an accurate statement of the law in that it allowed – but did not require – the jury to draw an inference of injury to competition from the fact that there was discrimination in price that was "substantial" in terms of amount, quantity, and duration. Tr. 3337. Moreover, petitioner did not object to the district court's instructions on this basis, did not raise the point in the court of appeals, and even now points to no specific error in the instructions. Accordingly, petitioner is not in a position to raise the issue. See Fed. R. Civ. P. 51. In any event, there was substantial evidence of actual injury to respondents in the form of displaced sales.

Petitioner's contention that the decision below conflicts with this Court's decision in *J. Truett Payne* is similarly without merit. In *J. Truett Payne* the Court rejected a theory of "automatic damages" equal to the difference in price and held that a plaintiff may recover damages only for the type of injury the Robinson-Patman Act was intended to prevent. See 451 U.S. at 562-563. In this case, respondents claimed that their sales and profits were reduced, and the jury was provided with a variety of damage studies, some of which were

1. We do not agree with the court of appeals' formulation of the applicable legal standard in this case. The court stated that a supplier that sells at uniform prices to purchasers at the same "functional" level in the distribution chain nonetheless may be liable under the Robinson-Patman Act if the discount afforded to a particular independent wholesaler is not "cost-based" and if the wholesaler passes on a portion of that discount to firms that compete with other customers of the supplier. Pet. App. A8. Although that formulation finds support in one old case (*Standard Oil Co.* v. *FTC*, 173 F.2d 210 (7th Cir. 1949), rev'd on other grounds, 340 U.S. 231 (1951)), and is not inconsistent with the words of the statute,[7] it is not a construction that this Court has ever adopted. In particular, language in *Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969), that might be read to support the court of appeals' formulation need not be so read in light of the facts of that case. The favored purchaser in *Perkins* owned, through a chain of subsidiaries, a direct competitor of the disfavored purchaser. Thus, liability could have been predicated on the failure of the supplier to offer the disfavored purchaser the same price it offered other purchasers operating at the same functional level. 395 U.S. at 651 (Marshall, J., concurring in part and dissenting in part).[8]

premised on the assumption that the price respondents paid would have been reduced. Nothing in *J. Truett Payne*, however, precludes the jury from concluding that the price discrimination in this case might have been eliminated by reducing the price that respondents paid, and from computing damages based on the additional sales and profits that would have followed if this assumption were true. Thus, the district court (Pet. App. B14) and the court of appeals (*id.* at A15-A17) correctly rejected the argument that *J. Truett Payne* foreclosed the jury from awarding damages based on the assumption that petitioner might have lowered its prices to respondents.

[7] The statute prohibits price discrimination that may "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. 13(a).

[8] The Court in *Perkins* also may have viewed the disfavored purchaser as being a wholesaler itself. See 395 U.S. at 644.

In our view, allowing liability to be imposed on the supplier when the disparity in the prices available to firms at the same functional level comes into being only as a result of the intervening pricing decision of an independent firm would, in general, extend the statute beyond the reach intended by Congress.[9] The Robinson-Patman Act was intended generally to prevent competitive injury that may arise when suppliers charge different prices to customers at the same functional level. See, *e.g.*, *Abbott Laboratories* v. *Portland Retail Druggists Ass'n*, 425 U.S. 1, 12 (1976). It is true that the favored and disfavored purchaser need not actually compete for a violation to occur. For example, a violation may arise if the supplier discriminates in price among wholesalers that do not compete with each other but whose retailer customers do compete. See *Falls City Industries* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983).[10] In that situation, however, the supplier has itself created the disparity between the prices paid by purchasers at the same functional level. Although intervening market forces may eliminate the disparity in prices downstream, the supplier has reason to anticipate that, so long as retailers in the disfavored channel of distribution are unable to purchase from wholesalers in the favored channel, the disparity it has created may persist.

A rule broadly subjecting suppliers to the threat of damage liability if an independent wholesaler elects to undercut the supplier's price to retailers—and if a jury later concludes that the wholesale discount was not cost based—would represent a significant extension of the law. Under such a rule, a supplier could protect itself from liability only by eliminating the func-

[9] We do not suggest that the requirements of the Act may be circumvented by means of a dummy wholesaler, controlled by the supplier or one or more purchasers. In that situation, the dummy firm's customers should be deemed the customers of the supplier for purposes of the Act. Cf. *Purolator Prods., Inc.* v. *FTC*, 352 F.2d 874 (7th Cir. 1965), cert. denied, 389 U.S. 1045 (1968); *General Auto Supplies, Inc.* v. *FTC*, 346 F.2d 311 (7th Cir.), cert. dismissed, 382 U.S. 923 (1965); 5 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 36.03[2] (1989).

[10] In *Falls City*, the wholesale purchasers were precluded by state law from competing with each other.

tional discount or by attempting to tailor the discount precisely to the costs and pricing strategies of each individual wholesaler. The former alternative would eliminate the ability of most independent wholesalers to compete with the supplier and thus would be tantamount to outlawing systems of dual distribution.

The latter alternative is probably impossible, since it would require the supplier to obtain data about the costs and pricing strategies of the wholesalers with which the supplier competes for retail sales. Even if it were possible to obtain such data, this strategy would still entail administrative burdens that could impede development of efficient pricing systems. Cf. *Falls City*, 460 U.S. at 449 (a requirement that the "meeting competition" defense be applied on a customer-by-customer basis might make meaningful price competition unrealistically expensive). For example, if the supplier did somehow obtain the necessary data and attempted to tailor the functional discount to each individual wholesaler, it would risk liability for discriminating among wholesalers if it failed to calibrate the discount precisely and thereby caused competitive injury to a wholesaler.

Moreover, suppliers' efforts to avoid liability could penalize efficiency and discourage price competition. The wholesalers most likely to have their discounts reduced or eliminated by suppliers fearful of liability under the Act would be the ones with the lowest distribution costs and the most aggressively competitive pricing policies.[11] Thus, such a construction of the Act

[11] Accordingly, commentators have generally criticized the approach that was adopted by the Federal Trade Commission (FTC) and the Seventh Circuit in the old *Standard Oil* litigation and now appears to have been endorsed by the court of appeals in this case. See, *e.g.*, F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 196-205 (1962) (criticizing *Standard Oil* and arguing that "any lower price in favor of a distributor always creates a capacity to 'pass it on' and underprice the supplier (or other distributors) in resales to the 'retailer' level") (emphasis omitted); C. Edwards, *The Price Discrimination Law* 304 (1959) (noting "unavoidably awkward" consequences of holding manufacturers liable for differences in prices paid by directly supplied retailers and those who purchase through distributors); *id.* at 313 (after discussing problem in light of *Standard Oil*, noting that the "failure of the Congress to cope with the problem either by excluding it from the application of the statute or by applying a rule suited to its peculiar nature has left the [Federal Trade

would conflict with this Court's admonitions that, whenever possible, courts should avoid interpretations of the Robinson-Patman Act that undercut the procompetitive purposes of the antitrust laws. See *Great A&P Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979) (quoting *Automatic Canteen Co. of America* v. *FTC*, 346 U.S. 61, 63 (1953)); *United States* v. *United States Gypsum Corp.*, 438 U.S. 422, 458 (1978).

2.a. Despite our concerns about the court of appeals' discussion of the law, we are not persuaded that this case warrants review. As an initial matter, we do not believe that the case stands as authority for the sweeping proposition that a supplier must undertake affirmatively to monitor the costs and pricing policies of each wholesaler. The district court instructed the jury that "there may be a price discrimination if a portion of that lower price was passed on to [retailers] and * * * [petitioner,] before the sale was made[,] knew that a portion of the difference would be passed on to the customers." Tr. 3336.[12] In

Commission an impossible job in this type of case"); 5 J. von Kalinowski, *supra*, §§ 31.02-31.03 (analyzing *Standard Oil* and *Perkins*, suggesting that the latter decision should be not "be given any broader scope than is justified by the unique facts which were before the Court"). See also *Report of the Attorney General's National Committee to Study the Antitrust Laws* 202-207 (1955) (criticizing *Standard Oil* on the ground that "imposing on any dual supplier a legal responsibility for the resale policies and prices of his independent distributors contradicts basic antitrust policies").

[12] There was evidence in the record to support a conclusion that petitioner had such knowledge. Virtually all respondents testified that they complained, at one time or another, to Robert Vogelman, petitioner's sales representative with responsibility for marketing in Spokane. In a letter to a Federal Energy Administration (FEA) official discussing possible modification of certain FEA regulations, James W. Kinnear, an official of petitioner, stated that large urban distributors like Dompier and Gull had "shed[ ] their traditional functions" and were thus able to reduce their "overhead cost to the point where a good portion of the discount is not being utilized to defray their costs of distribution at all." Br. in Opp. App. B5. There was also testimonial and documentary evidence tending to establish that petitioner's officials expressed great concern about "the very serious problem of rampant and alarming increases in distributor gasoline volume" (Tr. 1414), which they attributed to the ability of distributors operating retail stations to take advantage of the whole-

denying petitioner's motion for judgment NOV, the district court observed that a legitimate functional discount should be "reasonably related" to the expenses assumed by the favored purchaser, but it expressly declined to require suppliers to tailor each purchaser's discount precisely to its individual costs and pricing practices. To the contrary, it emphasized that "a precise accounting of the value of the performed functions is not mandated." Pet. App. B5.[13] The court of appeals, citing *Perkins* v. *Standard Oil Co.*, *supra*, and *Standard Oil Co.* v. *FTC*, *supra*, similarly emphasized that liability would only attach if the discount is "sufficiently substantial and is unrelated to the costs of the customer's function," so that "the connection between the seller's price discrimination and the adverse effect on competition is obvious and foreseeable." Pet. App. A9-A10.[14] Thus, petitioner was not held liable for failing to eliminate any possibility that any wholesaler could pass through a portion of a discount. Rather, liability was predicated on evidence indicating that petitioner continued to make available a discount knowing that it was unrelated to the wholesalers' costs of distribution and would likely be passed through to competitors of its own retailer customers.

Accordingly, we do not think that this case on its facts presents the broad issue that petitioner discusses (whether a supplier must show that its discounts to wholesalers relative to retailers are cost based). The case instead presents the narrower question whether a supplier, with *actual knowledge* that its

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sale discount to undersell stations that petitioner supplied directly. See Tr. 1390-1393, 1401-1411, 1416-1417.

[13] Petitioner, it explained, had "made no serious attempt to quantitatively justify its functional discounts" (Pet. App. B5), relying simply on an identification of some of the functions performed. *Id.* at B5-B6.

[14] The Seventh Circuit in *Standard Oil* modified the FTC's original order to indicate that the supplier could be held liable only if it *knowingly* chose a wholesaler customer that intended to use its price advantage to undersell the supplier's price to retailers. 173 F.2d at 217; see also C. Edwards, *supra*, at 307-308. This Court in *Perkins* thought it significant that "Standard officials were aware" of the downstream effect of their discounts at the first level of distribution. 395 U.S. at 649.

wholesaler discount is being passed through and is conferring a competitive advantage on the retailers that are in competition with directly supplied retailers, may be held liable for the resultant competitive injury. That issue, whatever its correct ultimate resolution may be, does not warrant review by this Court at this time. The decision below, when read in this limited fashion, does not conflict with the holding of any other court of appeals.[15] And the serious concerns that we have discussed

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[15] The cases on which petitioner and its amici rely contain only general statements similar to the statement of the court of appeals in the present case that "goods may generally be sold to wholesalers at a lower price than that charged to retailers" (Pet. App. A7). The plaintiff in *White Indus.* v. *Cessna Aircraft Co.*, 845 F.2d 1497 (8th Cir.), cert. denied, 109 S. Ct. 146 (1988), was a retail dealer of aircraft. Insofar as the plaintiff claimed the supplier violated the Act by selling at a discount to wholesalers that passed on the discount to end users, the court said that the allegation *would* state a violation of the Act if true (845 F.2d at 1498), but the allegation was rejected on the facts. The plaintiff, despite being a retailer itself, also sold to other retailers. The footnote quoted in the petition (at 11) rejects the plaintiff's argument that it was a violation of the Act for the supplier to sell airplanes to the plaintiff at the *same* price as offered to a retailer to whom the plaintiff wished to resell. The argument that the Robinson-Patman Act *requires* price discrimination between two retailers is very different from the argument on which respondents prevailed in this case. The statement that the National Association of Manufacturers et al. (NAM) quote (Br. 7-8) from *Eximco, Inc.* v. *Trane Co.*, 737 F.2d 505, 515 (5th Cir. 1984), is not the holding of that case. The *Eximco* court merely held that "this case * * * involves no favored sale." 737 F.2d at 516. In *O'Byrne* v. *Cheker Oil Co.*, 727 F.2d 159, 164 (7th Cir. 1984), which NAM also quotes (Br. 8), the court merely held that it did not violate the Act for the defendant to charge lower prices to ultimate consumers at *its own* retail outlets than the plaintiffs, who also purchased gasoline from the defendant, were able to charge at retail. That is a far cry from the allegations in this case. *Dart Indus.* v. *Plunkett Co.*, 704 F.2d 496, 499-500 (10th Cir. 1983), which NAM (Br. 8) and the Society of Independent Gasoline Marketers of America et al. (Br. 9) cite, rejects the naked assertion that different prices charged to a wholesaler and to a retailer are necessarily unlawful, in a case in which the plaintiff does not appear to have attempted the kind of proof that was presented in this case concerning the effect of the different prices on competition at a single functional level. The same appears to be true of *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 543 F.2d 1019 (2d Cir. 1976), cert. denied, 429 U.S. 1097 (1977).

above about a rule requiring suppliers to prove affirmatively that wholesaler discounts are cost based do not apply with the same force to the narrower rule that a supplier must mitigate the known downstream effects of a passed-through wholesaler discount.[16]

Moreover, even if a supplier may in theory be held liable for competitive injury resulting from an independent wholesaler's decision to pass through a discount, it is by no means clear that many plaintiffs will succeed in recovering damages under such a theory. In addition to proving that some portion of the discount was passed through, the plaintiff would have to prevail in showing that the passed-through discount caused actual competitive injury. The mere fact that the plaintiff lost some sales would not conclusively establish such injury, as diverted sales could result from other causes. The inference that substantial price discrimination between competing purchasers over time causes, or tends to cause, competitive injury "may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Falls City*, 460 U.S. at 435; see also 5 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 31.02[3], at 31-78 (1989) ("In third line injury cases * * * additional relevant factors may make it easier to rebut causation than in secondary line cases. Perhaps the most important factor is the intervening business or pricing policies of an independent distributor. These policies * * * may prevent the injury from being the natural or probable 'effect of' the asserted illegal practices.") (emphasis and footnotes omitted).[17]

[16] We do not urge the Court to grant review in this case in order to consider the correctness of the FTC's statement that "the difference in the prices that the wholesaler and retailer pay cannot support a claim of secondary line competitive injury under the Act." *Boise Cascade Corp.*, 107 F.T.C. 76, 199 (1986), rev'd and remanded on other grounds, 837 F.2d 1127 (D.C. Cir. 1988). The Commission found a violation of the Act in *Boise Cascade*, and its comments on whether a violation of the Act could be found on other facts were dicta.

[17] It should also be noted that a supplier can claim the statutory "cost justification" defense if it can demonstrate that the discount afforded wholesalers reflects its own cost savings, without regard to the wholesaler's costs. See 15 U.S.C. 13(a); *Automatic Canteen Co. of America* v. *FTC*, *supra*. Petitioner asserted the cost justification defense in this case, but the district court instructed the jury that the defense had been withdrawn from its consideration (Tr. 3321-3322), and petitioner has not pursued the issue.

In addition, market forces should tend to discourage a supplier from offering independent wholesalers discounts that would allow them to undercut the supplier's own retailer customers. A supplier would not normally find it profitable to offer independent wholesalers a discount in excess of the supplier's cost of providing the distribution services itself. To be sure, wholesalers might be able to undercut the supplier's price to retailers if the wholesalers were more efficient than the supplier in distributing the product. In that situation, however, it would be in the interest of all parties—the supplier, the wholesalers, the retailers, and the ultimate consumers—to structure the distribution network so that all retailers could purchase from the wholesalers. And, in any event, a wholesaler that received a discount in excess of its distribution costs would not necessarily pass it on to retailers. Particularly if the other sources to whom retailers might turn were pricing at a level that did not reflect the discount, the wholesaler might well find it profitable to retain all or most of the discount as profit. Thus, it is not clear that a pass-through theory is likely to lead to recovery in very many cases.[18]

[18] A partial explanation of petitioner's failure to reduce its discount may be afforded by the FEA regulations governing the pricing of petroleum products in the 1970s, which apparently constrained to some degree petitioner's flexibility in adjusting its prices. See generally *Typhoon Car Wash, Inc.* v. *Mobil Oil Corp.*, 770 F.2d 1085, 1087-1088 (Temp. Emer. Ct. App.), cert. denied, 474 U.S. 981 (1985); Tr. 2083-2086 (explanation by petitioner's witness that altering price to distributors in the Spokane market would have "cost" petitioner several million dollars under FEA "cost bank" accounting procedures). Petitioner apparently attempted to reduce its wholesale discount in 1973 and 1977, but that effort was challenged on the basis that it violated then-applicable FEA regulations. Tr. 2038, 2084-2085. The district court rejected petitioner's asserted defense based on the FEA regulations the first time the case was tried. That ruling was affirmed on appeal (663 F.2d at 933) and is not at issue here.

b. Nor is it clear that the issue petitioner presents is of major significance to the ultimate outcome of this case. Despite the emphasis petitioner has placed on the status of functional discounts afforded to independent wholesalers, and the resulting discussions of that issue by the lower courts, a review of the record indicates that the jury could reasonably have viewed Dompier and Gull as retailers in direct competition with respondents.[19] Petitioner does not claim that Gull ever operated solely as a wholesaler, and Dompier concededly was in the retail business beginning in 1974 (Pet. 4 n.3; Pet. App. B4 n.4).[20] In this regard, we do not read the record to support petitioner's contention that respondents have conceded that, if the wholesale discount was lawful in the early portion of the damage period, then the jury's verdict must be reversed Pet. 4 n.3; Reply Br. 2. Respondents' concession, if any, was explicitly limited to whether their damage proof, which was not segregated by time period, would be legally sufficient if petitioner proved that it had a valid "meeting competition" defense for a portion of the damage period. See Tr. 3165-3166.

Although Dompier did not own any retail stations before 1974, some of the retail stations that it supplied were owned and operated by its salaried employees (Pet. App. A5).[21] Accordingly, the jury may well have found liability on the theory that Dompier and Gull themselves competed with respondents.[22]

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[19] The jury also could have viewed Dompier and Gull as dual distributors, who operated at both the wholesale and the retail level. In this respect, the finding of liability is consistent with the decision in *Boise Cascade Corp.*, *supra*.

[20] Indeed, Neil Dompier, president of Dompier, testified that, by the mid-1970s, Dompier sold at retail "[p]robably 84 to 90 percent" of the gasoline it purchased from petitioner. Tr. 757.

[21] Dompier supplied two stations owned by the "Red Carpet" firm formed in the late 1960s by John Dompier, Neil Dompier's father. From 1971 (the beginning of the damage period) until 1973 (when Neil Dompier succeeded his father as president of Dompier), John Dompier was the sole owner and president of both Dompier and Red Carpet. Tr. 755, 797, 1112.

[22] The jury was instructed that, "[i]n order for a nonfavored and favored purchaser or its customers to be in competition with each other, the nonfavored and the favored purchaser or its customers must be on the same functional basis." Tr. 3340-3341.

If the jury viewed Dompier and Gull as competitors of respondents, petitioner could be liable, without regard to a pass-through theory, for offering Dompier and Gull discounts. The FTC has held that an integrated distributor that resells at both wholesale and retail may violate the Act by receiving a wholesale functional discount unavailable to other retailers on the goods it sells at retail. *Boise Cascade Corp.*, 107 F.T.C. at 210-215. Thus, there is no reason to believe that the evidence or the verdict as to petitioner's liability would differ if this Court were to reverse and remand for a third trial.[23] In these circumstances, we do not urge the Court to grant review.

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[23] The damage award might differ, however, because respondents' expert witness based his damage calculation on data relating to four specific stations, not all of which were owned or affiliated with Gull or Dompier. Respondents therefore would be required to present different evidence as to damages.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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